



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 20 2012

Brian G. Svoboda, Esq.
Perkins Coie LLP
700 Thirteenth Street NW
Washington, DC 20005-3960

RE: MUR 6695
Chris Dodd for President, Inc. and
Kathryn Damato in her official
capacity as treasurer

Dear Mr. Svoboda:

In the normal course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") became aware of information suggesting that Chris Dodd for President, Inc. and Kathryn Damato in her official capacity as treasurer ("Committee") may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). In a letter dated April 19, 2012, the Committee was notified that it was being referred to the Commission's Office of the General Counsel for possible enforcement action under 2 U.S.C. § 437g. On November 8, 2012, the Commission found reason to believe that the Committee violated 2 U.S.C. § 434(b), a provision of the Act, and 11 C.F.R. § 104.3(a), a Commission regulation. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement prior to a determination by the Commission as to whether there is probable cause to believe that the Committee violated the Act. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to the Committee as a way to resolve this matter at an early stage.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

We look forward to your response.

On behalf of the Commission,



Caroline C. Hunter
Chair

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Chris Dodd for President, Inc. and Kathryn Damato
in her official capacity as treasurer

MUR: 6695

I. INTRODUCTION

This matter was generated by a referral to the Office of General Counsel ("OGC") from the Audit Division ("Referral")¹ following a Commission audit pursuant to 26 U.S.C. § 9038(a) of the Presidential Primary Matching Payment Account Act, as amended, of Chris Dodd for President, Inc. and Kathryn Damato in her official capacity as treasurer ("CDFP" or the "Committee"), Dodd's designated, publicly-funded campaign committee for the 2008 presidential race. The audit covered the period January 24, 2007, through September 30, 2008. On April 9, 2012, the Commission unanimously approved the Final Audit Report ("FAR"), which included a finding that CDFP misstated its receipts.

For the reasons set forth below, the Commission finds reason to believe that Chris Dodd for President, Inc. and Kathryn Damato in her official capacity as treasurer violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(a).

II. FACTUAL AND LEGAL ANALYSIS

A. Background

As described in the FAR, CDFP understated its receipts by a gross amount of \$764,966 and a net amount of \$355,240 as follows:

¹ In response to OGC's notification of the Referral, Chris Dodd for President, Inc. directed OGC to its prior responses to the Preliminary Audit Report and the Draft Final Audit Report. See Letter from Brian G. Svoboda to Jeff Jordan (June 27, 2012). Those prior submissions are discussed below.

• Matching fund payment received July 17, 2008, not reported	\$ 514,173
• Net realized losses (investment accounts), not reported	(150,370)
• Vendor refund, not reported	5,876
• Offsets to operating expenditures, not reported	23,954
• Political committee contributions, not reported	16,100
• Unexplained difference	(54,493)
Net understatement of receipts	<u>\$ 355,240</u>

1 FAR at 17.

2 Throughout the Audit process, beginning with the exit conference at the conclusion of the
3 audit, Audit staff discussed with the Committee its understatement of receipts and other material
4 misstatements. *Id.* In response to the exit conference, CDFP explained the source of some of
5 these understatements of receipts, including that offsets to the operating expenditures were not
6 reported because CDFP was unaware of the data processing requirements for entering debts and
7 obligations. *Id.* Thus, many debt payments were not disclosed in CDFP's reports. *Id.*

8 In the Preliminary Audit Report ("PAR"), the Audit staff recommended that CDFP
9 amend its reports to correct the misstatements for 2008. *Id.* In response to the PAR, CDFP
10 stated that, after the date of ineligibility for presidential primary matching funds, CDFP had
11 some difficulty preparing its reports due mainly to problems using its financial database. *Id.* at
12 18. Because of this difficulty, CDFP failed to disclose the matching fund payment received on
13 July 17, 2008, even though the payment was otherwise a matter of public record. *Id.* CDFP
14 indicated that it would file amendments to correct this and other misstatements. *Id.*

15 In addition, CDFP asserted that the PAR did not correctly present the "level of
16 misstatement," mainly because of its treatment of the realized losses in CDFP's investment
17 account. *Id.* CDFP argued in its written response to the PAR that the PAR "appears to confuse
18 fluctuations in the account's fair market value, which do not need to be reported, with the actual

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1 sale of the portfolio assets.” FAR at 18. Because CDFP did not accept Audit’s assessment of its
2 investment accounts presented in the PAR, it did not make all of the recommended adjustments
3 relating to the investment accounts in its amended reports. *Id.* Specifically, the amended reports
4 did not include net realized investment losses of \$150,370, which Audit asserts resulted from the
5 sale of bonds and other securities from January 1 through September 30, 2008, as reflected on
6 the investment account statements. *Id.* As a result, CDFP’s receipts remain misstated for 2008.
7 *Id.*

8 In its response to the Draft Final Audit Report (“DFAR”) and at the Audit Hearing on
9 August 31, 2011, the Committee again asserted that Audit improperly treated CDFP’s investment
10 account losses. *Id.* CDFP contended that, just as Audit retreated from its initial contention in the
11 Audit Report on Friends of Weiner (approved by the Commission on June 24, 2009) (“Weiner
12 Audit Report”) that a committee must report unrealized gains and losses, a similar
13 misunderstanding of the law initially shaped CDFP’s audit. Letter from Marc E. Elias and Brian
14 G. Svoboda to Thomas Hintermister at 3 (July 26, 2011) (“Dodd Resp.”).

15 CDFP contended that even if the DFAR misstatement finding reflects the sum of realized
16 losses (*i.e.*, the accumulation of losses from actual sales of stock, as opposed to mere fluctuations
17 in value), the statute and regulations still provide no explicit guidance on how these must be
18 reported. *Id.* at 4. CDFP noted that the statute requires disclosure of, *inter alia*, “dividends,
19 interest and other forms of receipts” and “any other disbursements[,]” citing 2 U.S.C.
20 §§ 434(b)(2)(J) and 434(b)(4)(G), and argued that neither the Federal Election Campaign Act of
21 1971, as amended (the “Act”) nor the Commission regulations explicitly refers to the disclosure
22 of losses, especially within an investment account. *Id.* CDFP also pointed out the inconsistency
23 between Audit’s and OGC’s analysis of how the realized losses should be reported; the DFAR

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1 concluded that the Committee failed to disclose realized losses as "Other Receipts," whereas
2 OGC recommended that they be disclosed as "Other Disbursements." *Id.* Similarly, at the Audit
3 Hearing, CDFP argued that there was no legal authority that required CDFP to disclose realized
4 losses in an investment account. FAR at 18.

5 CDFP argued that the Commission should not find that CDFP "violated the law on such
6 an ambiguous question, when the auditors changed the legal standard in the middle of the audit,
7 and when there is still no clear agreement about how the Committee specifically should have
8 reported this activity."² Dodd Resp. at 4. Subsequent to the Audit Hearing, Audit clarified to the
9 Committee that it should report its net realized investment losses of \$150,370 on Schedule A-P
10 (Itemized Receipts), Line 21 (Other Receipts) as a negative receipt. FAR at 18.

11 CDFP has submitted amended reports to address the material misstatements relating to
12 the matching fund payment, the vendor refund, and the offsets to operating expenditures, but
13 CDFP has only partially amended the unreported political committee contributions. The
14 Committee has yet to amend its reports to reflect realized losses from its investment account.

15 On March 1, 2012, the Commission considered the Audit Division Recommendation
16 Memorandum ("ADRM") in which Audit recommended that the Commission find that CDFP
17 misstated its financial activity for 2008 by understating its receipts by a net amount of \$355,240.
18 *Id.* The Commission unanimously approved Audit's recommendation. *Id.* On April 9, the

² The Committee also argued that "the invested funds were segregated so as not to be used in the [presidential] primary election. One could easily tell from the Committee's reports how much Senator Dodd had raised for the general election – and how much he would have available when nominated, or would have to dispose of when he lost." Dodd Resp. at 4. The point the Committee raises does not apply here. It relates instead to another Finding in the FAR that was not referred. See FAR at 6-8, Finding 1 (Net Outstanding Campaign Obligations) (relating to the valuation of CDFP's investment account containing only general election contributions to ensure the need to refund those contributions had no impact on Dodd's matching fund entitlement for the primary election). Consequently, the Committee's segregation of funds used for Dodd's presidential candidacy is irrelevant to the issue presented: the Committee's obligation to disclose its realized losses in its investment account.

Commission unanimously approved the FAR, which includes at Finding 3 the misstatement of CDFP's financial activity in the Referral.

B. Legal Analysis

The Act and Commission regulations require committee treasurers to report accurately all receipts and disbursements. *See* 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(a), (b). This includes receipts of contributions, 2 U.S.C. § 434(b)(2)(A), refunds and other offsets, 2 U.S.C. § 434(b)(2)(I), matching funds received, 2 U.S.C. § 434(b)(2)(K), dividends, interest, and other receipts, 2 U.S.C. § 434(b)(2)(J), and other disbursements. 2 U.S.C. § 434(b)(4)(G).

The Act and Commission regulations do not specifically address the manner in which a committee should report realized investment losses. CDFP has noted that the statute requires disclosure of, *inter alia*, "dividends, interest and other forms of receipts" and "any other disbursements[.]" citing 2 U.S.C. §§ 434(b)(2)(J) and 434(b)(4)(G), and argued that neither the Act nor the Commission regulations explicitly refers to the disclosure of losses, especially within an investment account. Dodd Resp. at 4. CDFP has argued that there is no legal authority that requires CDFP to disclose realized losses in an investment account. FAR at 18.

The Commission's *Campaign Guides* provide that committees should report investment losses as negative entries in the "Other Receipts" category of the detailed Summary Page. *See Campaign Guide for Political Party Committees* (Aug. 2007) at 84 ("Report investment income received or lost during the reporting period in the 'Other Receipts' category (Line 17) of the Detailed Summary Page."); *Campaign Guide for Congressional Candidates and Committees* (June 2004) at 86 ("A committee should report investment losses as a negative entry under 'Other Receipts.'"); *Campaign Guide for Congressional Candidates and Committees* (Apr.

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2008) at 110 (“Report investment income received or lost during the reporting period in the ‘Other Receipts’ category (Line 15) of the Detailed Summary Page.”).

CDFP invokes the Weiner Audit Report to support its contention that it need not report *unrealized* losses in its investment account. Dodd Resp. at 3. The Weiner Audit Report ultimately determined that Friends of Weiner (“FOW”) was required to report *realized* losses in its investment account. Weiner Audit Report at 17 (“Initially, the Audit staff recommended that all investment gains and losses should be reported regardless of whether they had been realized, thus reflecting the investment’s market value at the close of the reporting period. FOW argued that only realized gains or losses needed to be reported[.] . . . The Audit staff accepts that reporting realized gains and losses is acceptable[.]”). The Referral does not purport to find a violation for CDFP’s failure to report unrealized gains or losses in its investment account. Indeed, the Referral does not address reporting of unrealized losses or gains at all. The Referral addresses instead CDFP’s undisclosed realized losses resulting from the sales of securities that appear on its investment account statements. The Weiner Audit Report is therefore inapposite to the facts here.

CDFP claims that the DFAR demonstrates a lack of clarity with respect to the reporting of realized investment gains and losses because Audit recommended that the realized losses be reported as negative other receipts, while OGC’s position at that stage of the process was that the realized capital losses should be reported as “other disbursements.” Dodd Resp. at 4. That OGC had previously stated that “[r]ealized capital losses must be reported as ‘other disbursements’ in the reporting period in which they are realized[.]”³ rather than as negative “other receipts” does

³ Memorandum to Joseph F. Stoltz, Assistant Staff Director, Audit, re Draft Final Audit Report for Chris Dodd for President, Inc., from Christopher Hughey, Acting General Counsel, *et al.* (May 24, 2011) at 4.

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1 not negate the fact that CDFP failed to report its realized losses *at all*. CDFP failed to report the
2 realized investment losses entirely — either as a negative entry “other receipt” as Audit
3 specifically recommended, and consistent with the *Campaign Guides*, or as an “other
4 disbursement.” CDFP’s reports therefore remain inaccurate, as the reports that CDFP filed still
5 do not indicate that it suffered any realized investment losses.

6 Despite the Committee’s obligations under the Act and implementing regulations to
7 report fully all of its receipts and disbursements, the guidance provided in the *Campaign Guides*
8 about how to report realized investment losses, and Audit’s further express direction that the
9 Committee amend its disclosure reports to include the realized investment losses, the Committee
10 has refused to disclose that information on the public record.

11 **III. CONCLUSION**

12 Accordingly, the Commission finds reason to believe that Chris Dodd for President, Inc.
13 and Kathryn Damato in her official capacity as treasurer violated 2 U.S.C. § 434(b) and
14 11 C.F.R. § 104.3(a).

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